

Ghimire (Migration) [2019] AATA 6231 (23 December 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Shekhar Raj Ghimire

CASE NUMBER: 1801247

HOME AFFAIRS REFERENCE: BCC2015/2987130

MEMBER: Rosa Gagliardi

DATE: 23 December 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations; and
- cl.80.221 of Schedule 2 to the Regulations.

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• Statement made on 23 December 2019 at 12:09pm

CATCHWORDS

MIGRATION – refusal – Partner (Temporary) (Class UK) visa – Subclass 820 – substantial corroborative evidence provided– genuine and continuing relationship–decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 12 October 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because there was limited evidence of a genuine and continuing spousal relationship at the time as defined by s.5F of the Migration Act.
4. The applicant appeared before the Tribunal on 28 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from his spouse and sponsor, Ms Noopon Kingi. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and Thai and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The Tribunal as currently constituted had made a favourable decision in this case in relation to a Schedule 3 matter, finding that there were compelling reasons why the Schedule 3 criteria ought to be waived and the applicant be permitted to make an application onshore. Nonetheless, the Tribunal also gained some initial impressions based on little evidence that raised questions about the genuineness of the relationship, even though this was not at issue at the time. The Tribunal gave the applicant and the sponsor the option of having the Tribunal recuse itself so that they could obtain a fresh look at their application without fearing that the Tribunal might be biased by its earlier impressions and comments. Both the applicant and the sponsor, however, asked that the Tribunal proceed and stated that they trusted that the Tribunal would bring an open mind to the proceedings.
7. Having examined the evidence before it in terms of whether the parties are in a genuine and continuing spousal relationship, the Tribunal finds that it had erred in making pre-emptory remarks which had not been based on any probative evidence.
8. The concerns centred on:
 - the applicant's migration history which involved breaching Australian immigration laws by remaining in the country for 3.5 years as an unlawful non-citizen working on farms for cash after his student visa was cancelled;
 - that the applicant had engaged in the deliberate flouting of Australia's immigrations laws to achieve a migration outcome;

- The breakdown of the applicant's relationship to his previous spouse appeared nebulous meaning that the relationship with the applicant might have been a construct to achieve a migration outcome.
9. While concerns about whether the applicant might still be in a relationship with his former wife are pertinent to whether the applicant is in a mutually exclusive relationship with the sponsor, the applicant's migration history is less so as it is plausible the applicant's continued presence in Australia coincided with him entering into a genuine and continuing spousal relationship.
 10. At hearing the applicant explained that his former wife had left him and that their two children were living in Nepal with the applicant's brother. The applicant also submitted evidence that his former wife had re-married in Nepal. Asked how he had been able to produce the evidence if he was estranged from his former wife, the applicant stated that a friend had sent it to him so that he could show the Tribunal that he was not intending to reconcile with his former wife.
 11. The parties had met where the applicant was working on a farm with the applicant's sister who introduced them.
 12. The sponsor at hearing stated that her former husband married a girl from his home country in Pakistan.

Whether the parties are in a spouse or de facto relationship

13. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. A marriage certificate has been submitted dated 20 March 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

16. *Financial aspects of the relationship*
17. The sponsor does not work due to her medical conditions but receives Centrelink payments and the parties gave evidence that their rental expenses are deducted from the sponsor's

Centrelink payments. Therefore, there is little left over from the limited Centrelink support. The applicant provides for all their other needs. The sponsor's son who resides in the home with the parties is receiving Centrelink payments in his own right as he is 22 years of age and is not working. The Tribunal has sighted the parties' joint bank statements from 20 March 2015 to 1 February 2016; and 20 September 2016 and 6 September 2017. A more recent statement has also been submitted. The Department noted that the account was used in an "inconsistent manner". Given the parties' limited financial resources the Tribunal does not place significant adverse weight on accounts which are not used extensively.

18. *The nature of the household*

19. The applicant spoke realistically about being a father figure in the household and how at times he clashed with the sponsor's son. At hearing the parties discussed how the sponsor liked to cook Nepalese and that while he enjoyed Thai food he often found that it did not suit his palate.
20. The parties have been living together since their marriage in 2015 and have submitted a range of household utility accounts. They claim to have been living together in government subsidised housing and the Tribunal accepts that this is the case. A Notice to Vacate such premises has been submitted, in both names and dated 30 September 2019.

21. *The social aspects of the relationship*

22. The Tribunal has sighted photographic material of the parties as a couple and in the company of others, including family and friends and on holidays. The Tribunal considers that it ought to place weight on this photographic in the applicant's favour because as the delegate noted, *"the photos indicate...(the parties) have undertaken some joint social activities, have met each other's friends and families and have travelled together"*.
23. The Tribunal's views that the parties' relationship is widely recognised by family and friends and institutions, is also supported by the documentary evidence submitted and sighted by the Tribunal. The sponsor's son who lives with the parties has also submitted a statutory declaration indicating that the applicant provides guidance in his life. Others have also submitted evidence of their support for the relationship.
24. More recently the Tribunal has received a report by Dr Paul L Grech, a consultant clinical psychologist dated 10 November 2019, stating that the applicant provides the sponsor *"considerable care and assistance for Ms Noopon Kingi...who is an ongoing patient of the examiner, attending on a weekly to fortnightly basis since referral via a Methal Health Care Plan by Dr Sanwar Sawdager in 2019....She reports that she is in receipt of significant care from Mr Ghimire, with whom the examiner has met on several occasions (he often accompanies Ms Kingi to her psychology appointments)"*...
25. The applicant's daughter in Nepal has also provided a letter dated 9 November 2019 stating that she and her brother have no objection to the marriage of their father and that they have had positive parenting from him.
26. The applicant's brother has also provided a letter to state that the applicant and his former wife on arrival in Australia faced many problems and were divorced and that his former wife re-married.
27. Furthermore, the applicant's spouse is listed as such in the applicant's tax returns for the years 2018-2019 and 2017-2018, which the Tribunal has sighted.

28. The Tribunal is satisfied that the applicant and sponsor are recognised in their community as being in a genuine and continuing spousal relationship.

29. *The nature of the commitment*

30. The parties have now been married for over four years. From the evidence the Tribunal accepts that the applicant has invested in the relationship by supporting the sponsor in a way that is consistent with the parties being in a genuine and continuing spousal relationship. For example, at hearing the parties independently told the Tribunal that the sponsor's eldest son was in prison for an offence involving a car. The sponsor told the Tribunal that the applicant drove her to the prison to see her son and that he was assisting her to deal with the depression she was experiencing as a result of this recent episode in their family life. The applicant gave consistent evidence about this matter and both parties volunteered to the Tribunal that the applicant had attended the Magistrate's court to provide support to the sponsor's son and sponsor.
31. Other evidence tendered constitutes airline tickets for both the applicant and sponsor to visit the sponsor's mother in Thailand in April 2019. The applicant explained that he had purchased the tickets but that the trip had to be abandoned as the sponsor was unwell at the time and he had had to absorb the financial loss of the tickets because they could not be refunded.
32. Given the longevity of the relationship as well as the more recent and persuasive evidence that the parties have a mutual commitment to a shared life to the exclusion of others, and that they do not live separately and apart on a permanent basis, the Tribunal is satisfied that the parties are in a genuine and continuing spousal relationship, despite its initial impressions about the applicant having entered the relationship for the sole purpose of gaining a migration outcome. It was clear to the Tribunal at hearing that the parties were both involved in the sponsor's family life and lived as a married couple.
33. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
34. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

36. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Rosa Gagliardi
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).